IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1080

MABEL DARCEL LOVELESS,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN H. SACHS,
Attorney General
of Maryland,
DEBORAH K. HANDEL,
Assistant Attorney General
Chief, Criminal Appeal
Division,
ALEXANDER L. CUMMINGS,
Assistant Attorney General,
One South Calvert Street,
Baltimore, Maryland 21202,
383-3737,
Attorneys for Respondent.

The Daily Record Co., Baltimore, Md. 21202

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1080

MABEL DARCEL LOVELESS,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY COMMENTS

This Brief in Opposition to Petition for Writ of Certiorari is filed pursuant to the request of this Honorable Court.

OPINIONS BELOW

On March 8, 1977, the Petitioner, Mabel Darcel Loveless appeared for trial in the Circuit Court for Anne Arundel County on charges of murder and other related offenses. During the course of the State's case-in-chief the trial judge granted the Petitioner's motion for a mistrial. When the State scheduled the case for retrial in September 1977, the Petitioner filed a motion

to dismiss the indictment against her on grounds of double jeopardy. A hearing was held pursuant to that motion before the Honorable E. Mackall Childs, on August 17, 1977. The Circuit Court denied the motion to dismiss and Petitioner immediately appealed this order to the Court of Special Appeals of Maryland. On June 12, 1978, the Court of Special Appeals filed a reported opinion affirming the order of the Circuit Court. See *Loveless v. State,* 39 Md. App. 563, 387 A.2d 311 (1978). On October 20, 1978, the Court of Appeals filed an order denying the petition of Loveless for a writ of certiorari. From that order as well as the reported opinion of the Court of Special Appeals of Maryland, the Petitioner has applied to this Honorable Court for a writ of certiorari to review the decisions of the Maryland Courts of Appeal.

JURISDICTION OF THE COURT

Petitioner has invoked the jurisdiction of this Honorable Court pursuant to the provisions of 28 U.S.C. Sections 1201(d) and 1257(3) and Supreme Court Rule 22(1).

QUESTION PRESENTED

Whether the Court of Special Appeals of Maryland correctly decided that the trial court properly denied the motion to dismiss the indictment on the ground of double jeopardy?

STATUTES INVOLVED

Petitioner contends that Amendment V of the United States Constitution is involved.

STATEMENT OF THE CASE

The Respondent would incorporate by reference herein those facts as set forth under "Opinions Below" *supra.* Respondent also adopts and incorporates by

reference herein the facts as set forth by the Court of Special Appeals of Maryland in its opinion (See pp. 8a-10a of the Appendix to the Petition in this case). Additionally, Respondent sets forth the factual affidavit of the Deputy State's Attorney, David Cuttler, which was introduced into evidence and considered by the trial judge at the hearing on Petitioner's Motion to Dismiss the Indictment. The affidavit in pertinent part is as follows:

> "The Affiant, David R. Cuttler, Deputy State's Attorney for Anne Arundel County, who has personal knowledge of the matters herein and is competent to testify thereto states as follows:
>
> 1. The Affiant was the prosecutor for the State of Maryland in the trial of Mable Darcel Loveless, commencing on March 8, 1977 in the Circuit Court for Anne Arundel County, Judge Matthew S. Evans presiding.
>
> 2. Some weeks prior to the trial, the State had entered into an agreement with a prosecution witness, George Hendricks, to the effect that the State would not oppose his transfer from the jurisdiction of the Circuit Court to that of the Juvenile Court, upon recommendation of the Department of Juvenile Services, provided that Mr. Hendricks: (1) testify for the State of Maryland; and (2) agree to take a polygraph examination to verify the truth of his testimony.
>
> 3. The defense team indicated to your Affiant that they would cross-examine Mr. Hendricks as to any 'deals' he made with the State in order to obtain his testimony.
>
> 4. On the morning of trial, March 8, 1977, a conference was held with Judge Evans in chambers. The conference was not specifically requested by defense counsel. It concerned, first, the requested voir dire questions of both defense and the State. Secondly, the conference concerned the request by the defense that the trial be removed from Anne Arundel County — the defense having asked for a removal the day before the trial was to

commence. The conference then considered the defense request for a continuance based on the State's having failed to include a witness' name on the State's Answer to Motion for Discovery. The defense having had full discovery and disclosure of the State's file and having been accorded ample time to review it and having full knowledge of the witness' name, address, and her testimony several weeks prior to trial, Judge Evans denied the continuance request. The final item considered was the matter of the polygraph test.

5. The defense requested of Judge Evans that he order your Affiant to tell his witnesses not to mention the fact that Hendricks had taken a polygraph test. Judge Evans did so order, your Affiant agreed to do so and, after a discussion concerning Hendricks, personally the conference was adjourned.

6. The prosecution team then moved into Courtroom number one where jury selection was begun.

7. At the first break in court time, your Affiant spoke with those witnesses present at the time and told them not to mention the fact that Hendricks had taken a polygraph test.

8. The State had summoned sixteen (16) witnesses in its case. Your Affiant does not know and cannot aver whether or not the witness Staley was present at the first day of trial. He was scheduled to appear on the second day of trial and it is the belief of your Affiant that he was *not* present on March 8, 1977. However, due to the number of witnesses present, most of whom were police officers, your Affiant is just not positive.

9. Detective Staley was present during the day of March 9th. Your Affiant, at the time of trial, could not remember speaking to this specific witness concerning the polygraph test, due to the number of police witnesses present. Your Affiant knew and so indicated to the Court that the officer knew better than to mention the test before the jury. The witness indicated (by shaking his head in response to either the court's or counsel's question) while on

the stand that no such instruction was given him. Your Affiant will not aver that the officer is wrong for the reason that your Affiant cannot testify, under oath, that he was. It was, and is, your Affiant's impression that the officer was so instructed for the reasons stated in paragraph 10 hereinbelow.

10. When the original agreement, outlined in Paragraph 2 was made with Mr. Hendricks your Affiant discussed it with Detective Staley. This conversation took place in the State's Attorney's office some weeks prior to March 8th. The agreement, its purpose as a matter of trial tactics, and its contents were discussed with Detective Staley. Specific mention was made of the explosive nature of the mention of the word 'polygraph' in testimony before a jury and the possible consequences of a mistrial occurring therefrom. Reference was made to a mistrial which had occurred some years ago as a result of a smiliar slip from a police officer in a case handled by the State's Attorney's Office in Anne Arundel County. It was made perfectly clear to Detective Staley what would happen if mention were made of the polygraph test.

11. Your Affiant was, and is, aware of the possibility of a mistrial occurring because of such testimony. For that reason, your Affiant accepts full responsibility for failing to instruct the officer again on March 8th or 9th, if in fact your Affiant failed to do so.

12. As the Court is aware, however, the remark made by the officer was elicited by cross-examination of the witness by the defense team. Your Affiant had been ordered to instruct the witness not to mention the fact that Hendricks *had taken* a polygraph test. The witness did not state that Hendricks had taken one, or the result thereof, or whether or not he had been offered one but rather that he had been with a polygraph operator for an unspecified period of time for an unspecified purpose.

13. Assuming, without conceding, that your Affiant failed to follow the Judge's instructions it is

not clear to your Affiant that the Detective would not have given the same answer to the question put to him by the defense.

14. The testimony from the Detective came at a point in the case when, in your Affiant's opinion, the case was progressing well in favor of the State. Testimony from Mr. Hendricks was most favorable. Virtually, all of the evidence proffered by the State had been received into evidence.

15. Your Affiant avers that literally the last thing he wanted to see was the introduction of a remark that would cause a mistrial in a case he believed that he was well on the way to winning.

16. And finally, your Affiant avers that he has never deliberately disobeyed an order of court in this or any other jurisdiction. If your Affiant failed to carry out the Court's order then it was by reason of inadvertence during the course of a complex murder trial involving many witnesses and several complex issues of law.

I, David R. Cuttler, make oath that the aforegoing facts are true and correct to the best of my knowledge, information and belief."

ARGUMENT

THE COURT OF SPECIAL APPEALS OF MARYLAND CORRECTLY DECIDED THAT THE TRIAL COURT PROPERLY DENIED THE MOTION TO DISMISS THE INDICTMENT ON GROUNDS OF DOUBLE JEOPARDY.

A. The Supreme Court Of The United States Has Clearly Defined The Term "Prosecutorial Overreaching" As That Term Is Used In The Context Of The Double Jeopardy Clause.

Because the first trial in this case resulted in a mistrial, the double jeopardy clause must be examined in this light. In this regard, it is well established that, where a mistrial is declared *over a defendant's objection,* the determination whether double jeopardy bars retrial depends on whether the mistrial declaration

was warranted by "manifest necessity." *United States v. Perez,* 22 U.S., 9 Wheat. 579, 580, 6 L. Ed. 165 (1824); *Illinois v. Somerville,* 410 U.S. 458, 459, 93 S. Ct. 1066, 1068, 35 L. Ed. 2d 425 (1973). However, different considerations obtain when the mistrial has been declared at the defendant's request. It is ordinarily assumed that a motion by the defendant for mistrial removes any barriers to reprosecution even if the defendant's motion is necessitated by prosecutorial or judicial error. However, this Court has carved out one exception to this rule, whereby retrial will not be permitted, if the mistrial is due to "judicial or prosecutorial overreaching." *United States v. Jorn,* 400 U.S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971), *United States v. Dinitz,* 424 U.S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976).[1]

As a reason for granting the writ, the Petitioner asserts that the Supreme Court has never explained what is meant by "prosecutorial overreaching." Respondent submits that Petitioner is clearly in error. Several decisions of this Court have addressed this very issue. In *United States v. Dinitz,* the Court defined in comprehensive fashion the term "judicial or prosecutorial overreaching:"

> "The Double Jeopardy Clause does protect a defendant against governmental actions *intended to provoke mistrial requests* and thereby subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where '*bad faith conduct* by the judge or prosecutor' threatens the '[h]arrassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant." 424 U.S. 611 (Emphasis supplied).

[1] The principles enunciated in *Dinitz* and *Jorn* are applicable because Petitioner moved for a mistrial.

Similarly, in *Lee v. United States,* 432 U.S. 23, 33, 97 S. Ct. 2141, 2148, 53 L. Ed. 2d 80, 89 (1977), the Court stated:

> "It follows under *Dinitz* that there [is] no double jeopardy barrier [to an accused] retrial unless a judicial or prosecutorial error that promoted [a defendant's mistrial] motion was 'intended to provoke' the motions or was otherwise 'motivated by bad faith or undertaken to harrass or prejudice' . . ."

Finally, the Court more recently reiterated and cited with approval *Dinitz* in *United States v. Scott,* ___ U.S. ___, ___ S. Ct. ___ 57 L. Ed. 2d 65 (1978):

> ". . . the double jeopardy clause does protect the defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendant to the substantial burdens imposed by multiple prosecutions."

Thus, it is clear that, under *Dinitz* and its progeny, "prosecutorial overreaching" is aimed solely at intentional conduct by the prosecutor amounting to bad faith harrassment which is intended to goad the defendant into requesting a mistrial. Prosecutorial conduct which falls short of this definition will not bar a retrial. Hence, the Petitioner's claim that "prosecutorial overreaching" has not been defined by this Court should be rejected as a basis for granting the writ.

B. The Decisions Of The Federal Circuits And State Jurisdictions Are Not In Conflict Over The Meaning Of Prosecutorial Overreaching

The Petitioner contends that decisions among state and federal courts conflict over the standard defining "prosecutorial overreaching" and the type of prosecutorial conduct required to satisfy that standard. The Petitioner acknowledges that there are many cases that have defined "prosecutorial overreaching" consistent with the decisions of this Court in *Dinitz, Jorn* and *Lee*

(Pet. 7). However, Petitioner cites ten cases from other federal and state jurisdictions which, according to her, have "split in interpreting the applicable standard" (Pet. 7-9).

A careful scrutiny of these cases reveals that there is no actual conflict by the courts in construing the meaning of "prosecutorial overreaching." *Downum v. United States,* 372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963) is readily distinguishable from the instant case because the mistrial was granted not at the request or with the consent of the defendant but on the motion of the prosecution over defense objection. Therefore, it was unnecessary to consider the *Dinitz* rule.

United States v. Romano, 482 F.2d 1183 (5th Cir. 1973) and *United States v. Wilson,* 534 F.2d 76 (6th Cir. 1976) both adhered to the *Dinitz* rule. In *Romano* the court found that the prosecutorial error was inadvertent and therefore retrial was permitted. In *Wilson* the court found that there were insufficient facts in the record to make a determination on the issue of prosecutorial overreaching and reversed and remanded the case for a further hearing.

While *United States v. Kessler,* 530 F.2d 1246 (5th Cir. 1976) and *United States v. Martin,* 561 F.2d 135 (8th Cir. 1977) seemingly adopt "gross negligence" as the standard to be used in determining "prosecutorial overreaching," this standard was dictum and not the holding in those cases. Both courts found that a retrial was barred because of the *intentional* misconduct by the government undertaken to harrass and prejudice the defendant's right to a fair trial.

Petitioner cites *United States v. Rumpf,* 576 F.2d 818 (10th Cir. 1978) and *United States v. Broderick,* 425 F. Supp. 93 (S.D. Fla. 1977) to show a conflict because these two cases, having similar facts, were decided differently. Initially, it should be noted that both cases

apply the *Dinitz* rule requiring intentional misconduct before "prosecutorial overreaching" can be found. Admittedly, each court reached a different result on an issue relating to the prosecutor's submission to the jury of evidence or statements. Yet these cases do not evidence a conflict as they can be easily reconciled because of the differing facts and circumstances. In *Rumpf* there was merely a misunderstanding between counsel as to admission of the evidence. However, in *Broderick* the prosecutor repeatedly violated an agreement ratified by the court not to introduce certain evidence.

Finally Petitioner alludes to three state decisions to support his argument. *State v. O'Keefe,* 343 A.2d 509 (N.J. 1975) is of no precedential value inasmuch as it was decided prior to *Dinitz* so that the New Jersey Court did not have the benefit of this Court's opinion in that case. The two Pennsylvania cases, while internally inconsistent insofar as the standard for "prosecutorial overreaching" is concerned, are ultimately consistent with this Court's opinions. The earlier decision in *Commonwealth v. Bolden,* 373 A.2d 90 (Pa. 1977) did adopt a standard of gross negligence in construing "prosecutorial overreaching." However, the more enlightened court in *Commonwealth v. Potter,* 386 A.2d 918 (Pa. 1978) recognized the error of its ways, overruled *Bolden* and adopted the standard of *Dinitz.*

In conclusion Respondent submits that decisions in state and federal courts do not conflict over the meaning of prosecutorial overreaching. Consequently, it is unnecessary for this Honorable Court to grant the Writ on this basis.

C. This Honorable Court Need Not Determine Whether Petitioner's Mistrial Motion Acts As A Waiver Of The Double Jeopardy Protection.

The Petitioner argues that his Petition should be granted because "the Supreme Court has never investigated whether the defendant's mistrial motion acts as a waiver of the double jeopardy protection if the defendant has no choice but to move for a mistrial. This issue would be one of first impression." (Pet. 11). Respondent submits that it is unnecessary to grant the Writ for this reason because this Court has made it quite clear that waiver has no meaning in this context. In *Dinitz* at 424 U.S. 609, 96 S. Ct. 1080 this Court said:

> "But traditional waiver concepts have little relevance where the defendant must determine whether or not to request or consent to a mistrial in response to judicial or prosecutorial error . . . In such circumstances, the defendant generally does face a 'Hobson's choice' between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error. The important consideration for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error."

In a related argument the Petitioner claims that, if she waived her double jeopardy claim by filing a motion for a mistrial, this waiver must satisfy the standards of *Johnson v. Zerbst,* 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1978). The Court likewise rejected this exact contention in *Dinitz:*

> "The respondent characterizes a defendant's mistrial motion as a waiver of 'his right not to be placed twice in jeopardy' and argues that to be valid the waiver must meet the knowing, intelligent and voluntary standard set forth in *Johnson v. Zerbst,* 304 U.S. 458, 58 S. Ct. 1692, 82 L. Ed. 1461. This approach erroneously treats the defendant's interest in going forward before the first jury as a constitutional right comparable to the right to

> counsel. It fails to recognize that the protection against the burden of multiple prosecutions underlying the constitutional prohibition against double jeopardy may be served by a mistrial declaration and the concomitant relinquishment of the opportunity to obtain a verdict from the first jury. This Court has implicitly rejected the contention that the permissibility of a retrial following a mistrial or a reversal of a conviction on appeal depends on a knowing, voluntary and intelligent waiver of a constitutional right." 96 S. Ct. 1080-1081 n.11.

Hence, Respondent submits that this basis for granting the writ is likewise untenable.

D. A Motion For A Mistrial Made By A Defendant Does Not Require The Trial Judge As A Matter Of Law To Inquire Into The Options And Need For A Mistrial.

In two related arguments the Petitioner urges that, whether prosecutorial conduct in this case is deemed overreaching, "double jeopardy may prevent reprosecution because the trial judge made an inadequate inquiry into the options and need for a mistrial." (Pet. 13). Petitioner claims that the trial judge erroneously failed to make such an inquiry in this case and for that reason this Court should grant the writ. In support of her argument Petitioner relies upon one Supreme Court and three federal cases. However, her reliance on these cases is misplaced. Those cases were concerned with situations where either the prosecution moved for a mistrial or the trial judge *sua sponte* declared one. The courts were concerned with an exercise of the trial judge's discretion in determining whether "manifest necessity" existed for a declaration of a mistrial. None of the courts required a judicial inquiry as urged by Petitioner, although in *Arizona v. Washington*, 434 U.S. 1305, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978) this Court recognized that curative instructions and disciplining or removing counsel from the trial may be considered

by the trial judge whose exercise of discretion in declaring a mistrial is entitled to great deference by this Court.

The present case is distinguishable because the mistrial request emanated from the Petitioner and not from the trial judge or the prosecution. Moreover, Petitioner can hardly complain that the trial judge erred when he did not conduct an inquiry, since he made no request along these lines before the mistrial was declared.

In any event, the record is clear that the trial judge considered and rejected the prosecutor's request to inquire of the jury whether the reference to the word "polygraph" prejudiced the jury.

E. The Decision Of The Court Of Special Appeals Of Maryland Was Fundamentally Fair And In Accord With Sound Reasons Of Public Policy.

The decisions of this Court in the cases discussed hereinabove have held that the test to apply in deciding whether double jeopardy will bar a retrial following a mistrial is whether "prosecutorial overreaching" was intentionally calculated to force a mistrial.

It is respectfully submitted that the prosecutorial conduct complained of in this case falls far short of the standards enunciated in those cases. The Petitioner here requested and received precisely what she asked for — a mistrial. At the hearing on the motion to dismiss on grounds of double jeopardy, the trial judge found that the prosecutor had, prior to Judge Evans' order, informed the officer not to mention the polygraph at trial (See p. 12a of the Appendix to the Petition). In view of the prosecutor's sworn belief that the trial was progressing well for the State, this is certainly not a case deliberately aborted by "prosecutorial overreaching." Even if the Deputy State's Attorney had failed to

notify the police officer of the Court's ruling, this failure was one of simple inadvertence. A fair reading of the prosecutor's affidavit adequately negates the presence of that type of prosecutorial misconduct necessary to bar a retrial. The record is totally devoid of any evidence of conduct by the prosecutor which was undertaken to harrass or prejudice the Petitioner in order to goad the Petitioner into seeking a mistrial so that the prosecution might have a more favorable opportunity to convict Petitioner. *Dinitz, supra* 96 S. Ct. 1081.

F. THE QUESTION LACKS SUFFICIENT IMPORTANCE TO WARRANT REVIEW BY THIS COURT.

As indicated by the previous discussion several decisions of this Honorable Court have defined the parameters of "prosecutorial overreaching" where that concept has been employed to bar a retrial after a mistrial has been declared at the defendant's request caused by such overreaching. Hence, there is no necessity for this Court to grant the Writ since it will merely be applying a well established rule of constitutional law to a particular set of facts and circumstances.

Petitioner argues that the writ should be granted in order to clarify the meaning of "prosecutorial overreaching" and allow this Court to decide whether that term means intentional conduct for the purpose of provoking a mistrial or gross negligence on the part of the prosecutor. Even assuming such clarification were necessary, the facts of this case do not provide a useful vehicle for deciding this issue. As previously shown there is not only no evidence of intentional misconduct but there is no evidence of any gross negligence. Indeed the Maryland Court of Special Appeals has more recently recognized that the language of *Loveless* is *dicta* precisely because the facts of the case did not even

approach prosecutorial overreaching (see p. 11a of the Appendix to the Petition). See *Bell v. State,* ___ Md. App. ___, ___ A.2d ___ (No. 352, September Term, 1978, filed January 10, 1979). (Slip Opinion p. 6). In view of these facts the urgency, immediacy and importance of the issue evaporates under closer scrutiny.

CONCLUSION

For the aforegoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari to the Court of Special Appeals of Maryland should be denied.

Respectfully submitted,

STEPHEN H. SACHS,
Attorney General
of Maryland,

DEBORAH K. HANDEL,
Assistant Attorney General
Chief, Criminal Appeal
Division,

ALEXANDER L. CUMMINGS,
Assistant Attorney General,

One South Calvert Street,
Baltimore, Maryland 21202,
383-3737,
Attorneys for Respondent.